IN THE

Supreme Court of the United States

No.....

OCTOBER TERM, A. D. 1946

SAUL S. FREEMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

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To the Honorable the Supreme Court of the United States:
Your Petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner was indicted (R. 17) and convicted (R. 34) of conspiring to wilfully violate the Second War Powers Act of 1942 (50 U.S.C.A. App. sec. 633 (5)) and sec. 20.1 of Revised Ration Order No. 16 (9 F.R. 6765).

Petitioner was likewise informed against (R. 2) and convicted (R. 24) for wilfully violating the Second War Powers Act of 1942 and sec. 20.1 of Revised Ration Order No. 16 and for wilfully violating the Emergency Price Control Act (50 U.S.C.A. App. sec. 925 (b)).

The information contains sixteen counts, but only Counts 1, 6, 7, 8, 9, 11, 12, 14, 15 and 16 apply to petitioner and are the counts upon which he was convicted and sentenced. All but Counts 14, 15 and 16 are based upon the Second War Powers Act. Counts 14, 15 and 16 are based upon the Emergency Price Control Act.

The indictment and information were consolidated for trial (R. 23) and the appeals to the circuit court from the convictions (R. 31, 38) were consolidated (R. 58, 556).

After petitioner's conviction by jury in the consolidated trial he was sentenced to ten months imprisonment on Count 1 of the information; to ten months imprisonment and fined $1,000 on Count 11, the imprisonment to run concurrently with that imposed on Count 1; to pay a fine of $1,000 on Count 12; imposition of sentence suspended on Counts 6, 7, 8, 9, 14, 15 and 16 and placed on probation for six months following the expiration of the prison sentences (R. 27-29). On the indictment petitioner was sentenced to imprisonment for ten months to run concurrently with the imprisonment sentences on Counts 1 and 11 of the information (R. 36-37).

After conviction petitioner appealed to the circuit court from both convictions (R. 31, 38) under appropriate assignments of error (R. 41-56, 549) which challenge the sufficiency of the indictment and information to charge an offense, rulings of the court on various evidentiary matters and instructions given by the court.

The Circuit Court of Appeals for the Ninth Circuit affirmed the judgments of conviction (R. 555-567) on December 30, 1945. A petition for rehearing timely filed was denied January 30, 1947 (R. 568).

The case involves the correctness of the opinion and orders of the Circuit Court of Appeals for the Ninth Circuit in effect denying all of petitioner's assignments of errors and affirming the judgments of conviction and this writ of certiorari is sought to review the rulings of the circuit court.

JURISDICTION

The jurisdiction of this court is invoked by virtue of section 240 of the Judicial Code (Title 28 U.S.C.A. sec. 347) and Rule 37(b) of the Federal Rules of Criminal Procedure.

The opinion and orders of affirmance of the circuit court were filed December 30, 1946 (R. 556, 566, 567). A petition for rehearing was denied January 30, 1947 (R. 568).

QUESTIONS PRESENTED

1. Do each of the counts of the information applicable to petitioner charge an offense against the laws of the United States?

2. Does the indictment charge an offense against the laws of the United States?

3. Did the trial court commit prejudicial error in giving the following instruction:

> "'Proof beyond all reasonable doubt' means just what the words imply, that any doubt which will justify acquittal must be a reasonable doubt, must be a doubt based on reason." (R. 478.)

and did the circuit court err in giving approval (R. 564, 565) to such instruction?

4. Did the trial court err in failing to define the term "wilful" in its instructions to the jury and did the circuit court err in holding that such failure did not prejudice petitioner (R. 564)?

5. Did the trial court fail to sufficiently define to the jury all the legal and factual elements the jury was required to know with reference to the indictment and the applicable counts of the information before petitioner could be found guilty?

6. Was there sufficient evidence concerning Counts 14,

15 and 16 of the information to warrant their submission to the jury and a verdict of guilty thereon?

7. Did the trial court err in failing to instruct the jury that the government must prove that at least one of the overt acts charged in the indictment as having been committed in the Eastern District of Washington was committed as alleged?

8. Did the trial court err in instructing the jury as follows:

> "In the event you are convinced or believe that Mr. Michael was an accomplice in that he knew that the law was being violated, you have the right, of course, then, to consider whether it is reasonably likely that he would have known such without the other persons connected with the restaurant having at least as much knowledge" (R. 501).

9. Did the trial court err in allowing, and in failing to instruct the jury to disregard, the opening argument of the United States Attorney to the jury, after both sides had rested, to the effect that because co-defendant Jacobs had pleaded guilty to the conspiracy that such a plea of guilty tended to show a conspiracy between Jacobs and petitioner (R. 523)?

10. Did the trial court err in admitting plaintiff's exhibit 62 (R. 294-303)?

11. Did the trial court err in admitting the evidence of

Louis E. Michael (R. 470) assertedly impeaching petitioner's testimony (R. 436-437)?

12. Were the errors committed by the trial court, considered as a whole, so prejudicial to the rights of petitioner as to deprive him of a fair and impartial trial?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The conviction on the indictment is void because it does not charge an offense against the laws of the United States.

2. The conviction on each of the counts of the information is void because none of such counts charge an offense against the laws of the United States.

3. The instruction of the court concerning the challenged instruction on proof beyond a reasonable doubt placed the burden of proof on petitioner to convince the jury that there was a doubt based upon reason before petitioner could be acquitted. Such an instruction is clearly in conflict with the rule announced in *Lilienthal's Tobacco v. U. S.*, 97 U. S. 237, 266, and *Potter v. U. S.*, 155 U. S. 438, to the effect that the burden of proof never shifts in a criminal case, but at all times rests upon the government to satisfy the jury from the evidence, beyond a reasonable doubt of the *affirmative of the issue* presented in the charge

that the defendant is guilty in the manner and form as charged.

The circuit court's opinion constitutes approval of the future use of this instruction by the district courts (R. 565). Such use we believe will seriously prejudice the rights of future defendants in the Ninth Circuit.

4. The failure of the trial court to define the term "wilful," although a definition was requested by the government (R. 24), and the approval of the circuit court, is directly in conflict with *Screws v. U. S.*, 325 U. S. 91, 101-107. It also conflicts with the doctrine that a conviction should not rest on an equivocal direction to the jury on a basic issue. *Bollenbach v. U. S.*, 326 U. S. 607, 613.

5. The failure of the trial court to properly define all the elements of the offenses of which petitioner was being tried invaded the province of the jury since they were given no opportunity of applying the facts to the law and hence the ruling of the circuit court conflicts directly with *Screws v. U. S.*, 325 U. S. 91, 107; *Bird v. U. S.*, 180 U. S. 356, 361; and *Sparf v. U. S.*, 156 U. S. 51.

6. There was not a scintilla of evidence offered by the government in support of Counts 14, 15 and 16 of the information.

7. The indictment charges overt acts both in the Eastern District of Washington (R. 19-20) where the cause was

tried and also overt acts in Montana (R. 21). The failure of the trial court to differentiate between the two locales of the overt acts permitted the jury to bring in a verdict predicated solely upon only one of the Montana overt acts. Such a result is in conflict with *Nash v. U. S.*, 229 U. S. 373, 379, 380.

8. The trial court's instruction (R. 501) to the effect that Michael's knowledge that the law was being violated could be imputed by the jury to petitioner is in direct conflict with the basic rule that knowledge of another in a criminal case cannot be imputed to a defendant without some evidentiary basis therefor.

9. The United States Attorney's opening argument to the jury at the conclusion of the case that because Jacobs, a co-defendant, had pleaded guilty after having the advice of competent counsel, tended to show a conspiracy between Jacobs and petitioner, was so highly improper and prejudicial as to call for action on the part of the trial court instructing the jury to disregard the remark, which was not done and resulted in serious prejudice to petitioner. The failure of the trial court so to do, and the ruling of the circuit court, conflicts with the duty imposed on the court by *Berger v. U. S.*, 295 U. S. 78; *Viereck v. U. S.*, 318 U. S. 236; and *N. Y. Central Ry. Co. v. Johnson*, 279 U. S. 310.

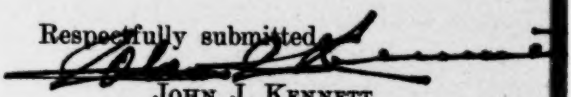
10. Plaintiff's Exhibit 62 was erroneously admitted and was extremely prejudicial to petitioner.

11. The testimony of Louis E. Michael offered to impeach petitioner was erroneously admitted and being the last testimony introduced was extremely prejudicial to petitioner.

12. The errors committed by the trial court and challenged in the appeal to the circuit court were so prejudicial to petitioner as to deprive him of a fair and impartial trial.

WHEREFORE petitioner prays that this Honorable Court issue a writ of certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit to the end that such court's opinion and orders affirming the judgments of conviction entered against petitioner may be reviewed and determined by this court, and that the cause be reversed, and for such other relief as the court may deem proper.

Respectfully submitted,



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BRIEF IN SUPPORT OF PETITION

THE OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 556-567) being Causes No. 11190-11191 of that court is not yet reported.

JURISDICTION

The jurisdiction of this court is invoked by virtue of section 240 of the Judicial Code (Title 28 U.S.C.A. sec. 347) and Rule 37(b) of the Federal Rules of Criminal Procedure.

The opinion and orders of affirmance of the circuit court were filed December 30, 1946 (R. 556, 566, 567). A petition for rehearing was denied January 30, 1947 (R. 568).

STATEMENT OF THE CASE

Some time in the early summer of 1944, petitioner Freeman, who was doing business as a licensed accountant (R. 387), conceived the idea that a restaurant and recreation center would succeed in Spokane and spoke to Harry C. Huse about it (R. 186, 187).

Thereafter the defendant Rose and Huse discussed the proposition (R. 188) which resulted in Rose and Huse entering into a partnership agreement on August 15, 1944 (R. 188, 190; Pl. Ex. 41).

This agreement also provided that petitioner should be the paid managing director of the business and devote time to the financial management of the business (R. 193, Section VIII). The agreement also provided that petitioner was to act as the paid accountant for the firm, and that checks could be signed by petitioner (R. 194; Sec. X and XI).

On the same date an agreement between petitioner and Huse was entered into (R. 200; Pl. Ex. 42) which provides that in consideration of petitioner advancing Huse $10,000 in connection with the restaurant, Huse agreed to repay this money, and to first devote all the profits of his share of the partnership to such repayment. Upon this sum being fully repaid petitioner then was to receive a one-third share of Huse's half interest in the Recreation Center. This sum was never repaid to petitioner (R. 208, 218).

As managing director of the business petitioner negotiated for the lease for the premises signed by Huse and Rose (R. 60-78; Pl. Ex. 1), took care of the contracts for the building construction, took care of the books of the concern, and through an assistant in his office (R. 386, 422-423) signed checks for disbursements for the enterprise, and devoted such little time as he could to the operation of Huse's Restaurant (R. 394, 396). Petitioner, as managing director, had the authority to determine policy (R. 151, 152), which he exercised.

The restaurant opened on December 27, 1944, and lost money from its inception and until the partnership between Rose and Huse was dissolved (R. 397). On May 22, 1945 petitioner and Rose became partners in the restaurant. Petitioner advanced a total of $19,951 toward the enterprise, and was still paying on the $10,000 note at the time of trial (R. 415).

Since petitioner and Rose had no experience in the restaurant business (R. 383, 394, 396, 410), a man named Michael, who was formerly with the restaurant section of the OPA, was employed from December 17, 1944, to March 24, 1945, to run the restaurant, and to take care of the rationing (R. 122, 123, 143, 395, 396). The ration checks were all issued by Rose and Michael (R. 125-128, 143).

Petitioner knew nothing about rationing (R. 410, 412, 457, 458). The only connection he had with rationing was that after Michael left an assistant in petitioner's office checked the invoices for the restaurant and made a mechanical check of the ration points shown on such invoices (R. 422, 423).

The ration records were kept at the restaurant (R. 334, 335), and petitioner personally had nothing to do with the computation of points for the restaurant (R. 425).

In January, 1945, petitioner met Ralph W. Jacobs (a defendant in the case), who was a camp supervisor for the

Northern Pacific (R. 356, 357). Petitioner asked him to help him in the restaurant in view of his experience, and Jacobs did give petitioner a number of valuable suggestions (R. 357-358, 398) about running a restaurant.

Jacobs pleaded guilty to all charges before the trial, but had not been sentenced (R. 371).

Jacobs testified that petitioner asked him about buying meat and shipping it out, after telling Jacobs the restaurant was short on points. Jacobs also testified that he told petitioner that Jacobs could borrow some ration points from his North Dakota account, and the restaurant would have to pay them back in the future, and that petitioner agreed to pay the points back (R. 358-362). Jacobs said petitioner gave him $500 in cash for possible purchases (R. 359), but it was, in fact, a check (R. 399-400; Deft's Ex. A) which was charged to Huse's Restaurant (R. 399). While Jacobs was in Minneapolis he purchased 4 barrels of meat from the Crown Meat and Provision Company; later he purchased another 4 barrels from the same concern and directed both shipments to go to Huse's Restaurant (R. 359, 360). Jacobs gave the seller points belonging to Mandan Creamery Company of North Dakota (R. 359, 360). The points were insufficient to cover the merchandise, and Jacobs told the seller he would send him the points in the near future (R. 361). Huse's Restaurant never repaid the points because OPA seized the records (R. 362). When the

restaurant was sold it had 23,374 unused ration points on hand (R. 468).

The shipments of the 4 barrels each were made on February 6, 1945, and February 12, 1945 (R. 153, 154) from Minneapolis, Minnesota, from the Crown Meat and Provision Company to Huse's Restaurant in Spokane (R. 360).

There was a sharp conflict between Jacob's story and petitioner's testimony concerning the conversation relative to ration points. Petitioner testified there was no conversation about points (R. 401, 402) concerning the barrels, and that he did not know what, if any, points were required (R. 412, 413). It should be remembered that the only evidence against petitioner to show any wilful violation on points re the barrel shipments was Jacobs because there was no testimony of any kind that petitioner ever contacted or saw the sellers of the produce or any of their agents or even saw any of the barrels themselves or their contents.

The other transaction upon which the charges are based is a purchase of meat by Jacobs in Missoula, some forty quarters. The evidence of this transaction is very clear that Jacobs told petitioner that the meat he could purchase in Missoula was point free. Jacobs so testified (R. 363) twice in the government's case in chief. When interviewed by the OPA investigators, petitioner so stated in Jacobs'

presence (R. 331, 332), and it was not denied by Jacobs (R. 337, 412). Petitioner told Rose it was point free beef (R. 378, 379, 381, 382).

Petitioner also testified that Jacobs told him the meat was point free (R. 405, 413).

The government sought to show that petitioner was familiar with rationing by examining petitioner about his signature on Pl. Ex. 68 (R. 458-461), but it is apparent from the examination that petitioner knew nothing about rationing.

All storage charges for all the meat was paid by Huse's Restaurant even after the account at the Hazelwood Cold Storage Company was placed in petitioner's name for security purposes (R. 145, 154, 155, 179-186, 416, 417).

All withdrawals of meat from the Hazelwood storage by Rose was for use in Huse's Restaurant (R. 135, 154, 324-326). It is clear that all the meat withdrawn by Rose and Michael was for use in Huse's Restaurant, and the government never contended otherwise.

It is also clear from all the evidence that petitioner never at any time contacted any of the sellers, shippers or storers of the meat and never even saw it.

While there was much documentary and other evidence offered by the government, the facts above given are the essentials of the case.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the indictment and each of Counts 1, 6, 7, 8, 9, 11 and 12 of the information charged petitioner with offenses against the laws of the United States.

2. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the trial court's definition of proof beyond a reasonable doubt was not error.

3. The Circuit Court of Appeals for the Ninth Circuit erred in holding that there was no prejudice to petitioner by the trial court's failure to define the term "wilful" in its instructions to the jury.

4. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the trial court adequately defined to the jury all the legal elements involved and the factual elements the jury must find to exist before the jury could apply the facts to the law and find petitioner guilty of the charges.

5. The Circuit Court of Appeals for the Ninth Circuit erred in holding that there was sufficient evidence to sustain the conviction on Counts 14, 15 and 16.

6. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the jury was sufficiently instructed with reference to the proof required concerning the overt acts alleged in the indictment.

7. The Circuit Court of Appeals for the Ninth Circuit erred in holding that no substantial rights of petitioner were violated by the instruction of the court that Michael's knowledge of a violation of law could be imputed to petitioner.

8. The Circuit Court of Appeals for the Ninth Circuit erred in holding that petitioner was not prejudiced by the failure of the trial court to instruct the jury to disregard the argument of the United States Attorney that Jacobs plea of guilty to the conspiracy charge tended to prove the conspiracy between petitioner and Jacobs.

9. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the admission of plaintiff's exhibit 62 was not prejudicial to appellant.

10. The Circuit Court of Appeals for the Ninth Circuit erred in holding that petitioner suffered no substantial prejudice from the admission of Louis E. Michael's testimony impeaching petitioner's testimony.

11. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the assigned errors of the trial court were not so prejudicial as to deprive petitioner of a fair trial.

ARGUMENT

SUMMARY OF ARGUMENT

Briefly the argument is addressed to why the writ should be granted and the grounds, broadly speaking, are that petitioner was not granted a fair trial and that most of the errors are of a fundamental character going to the roots of our legal system and are of importance not only to petitioner but to the general administration of justice in that our historic judicial system of safeguards to defendants generally must be maintained. We think serious intrusions on those safeguards are represented in this case.

It should be noted that counsel representing petitioner here and on the appeal to the circuit court did not represent him at the trial.

Trial counsel interposed no demurrer to the indictment or information nor made any request for a bill of particulars. No challenge to the sufficiency of the government's evidence was interposed at the conclusion of the government's case in chief. No motion for directed verdict was made at the conclusion of the entire case. No requested instruction on wilful was offered by trial counsel although one was offered by the government (R. 24) and not given. Trial counsel did not except to the giving of the instructions involved or to the failure to give any of the instructions here in issue. Many of our assignment of errors to

the introduction of evidence and the argument of government counsel are not supported by exceptions.

In view of the almost complete lack of protection afforded petitioner in the trial we are relying upon the rule that this court will notice material error though that error was not challenged.

Rule 52(b), Federal Rules of Criminal Procedure

Fisher v. U. S. (decided by this court June 10, 1946, No. 122)

Screws v. U. S., 325 U. S. 91, 107.

We also rely upon the rule that a federal judge is not merely a moderator, but must assure a fair trial and protect the essential rights of the accused.

Quercia v. U. S., 289 U. S. 466.

Starr v. U. S., 153 U. S. 614.

Bollenbach v. U. S., 326 U. S. 607.

Kettenbach v. U. S., (CCA 9) 202 Fed. 377, 385.

POINT 1

THE CIRCUIT COURT ERRED IN HOLDING THAT THE INDICTMENT AND COUNTS 1, 6, 7, 8, 9, 11 and 12 CHARGED OFFENSES AGAINST THE LAWS OF THE UNITED STATES

The indictment is void because it fails to state where the conspiracy was formed. It alleges complete ignorance as to the place and does not even state that that it was formed in the United States. *Cf. Brown v. Elliott*, 225 U. S. 392.

The indictment is void because the offenses allegedly conspired to be committed involve the mutual co-operation of the persons charged, and the preliminary agreement between the parties to commit it is thus not an indictable conspiracy.

U. S. v. Katz, 271 U. S. 354.

Gebardi v. U. S., 287 U. S. 112.

This is particularly true since subdivision (i) of section 20.1 of Revised Ration Order No. 16 (9 F.R. 6765), reproduced in the appendix hereto, reads as follows:

> "No person shall offer, solicit, attempt *or agree* to do, or assist in doing any act in violation of this order." (Italics ours)

This regulation covers conspiracy by its own terms. The conspiracy thus charged is an agreement to agree to do acts in violation of unspecified sections of the Ration Order. To allow the indictment to stand is to countenance charging a conspiracy to commit a conspiracy which is not permissible.

U. S. v. Armstrong (DC Ind.) 265 Fed. 683, 695.

U. S. v. New York Cent. & H. R. R. Co. (CC) 146 Fed. 298, 303.

The primary vice of both the indictment and the counts of the information in question is that nowhere do these pleadings point out specific acts based on specific provi-

sions of the regulations. The only regulation pointed out is section 20.1. Reference to it compels one to read the entire Ration Order consisting of 54 large pages of three column fine print to try to find out what is prohibited.

It is plain that a mere reference to the very general provision of section 20.1 and the statutes involved (50 U.S.C.A. App. sec. 925(b) and sec. 633(5)), which also give no warning of the *specific* acts prohibited, does not remedy the vagueness and indefiniteness condemned by the supreme court cases referred to in *U. S. v. Crummer,* (C.C.A. 10) 151 F. (2) 958, 962; in *Foster v. U. S.* (C.C.A. 9) 253 Fed. 481, 483, and in *Boykin v. U. S.* (C.C.A. 5) 11 F. (2) 484, 485.

The rule that the charge must descend to particulars applies here with great force since both section 20.1 of the Revised Ration Order and the statutes are very general in their terms.

Compare Counts 14, 15 and 16 and sec. 1364.407(f) of Rev. M.P.R. No. 169 (9 F.R. 9617). There the regulation referred to specifically describes the required act. Not so with sec. 20.1 of Revised Ration Order 16. This comparison makes the point very clear.

POINT 2

THE CIRCUIT COURT ERRED IN HOLDING THAT THE TRIAL COURT'S DEFINITION OF PROOF BEYOND A REASONABLE DOUBT WAS NOT ERROR.

This instruction (R. 478) is so clearly erroneous as to

require but little discussion. *Lilienthal's Tobacco v. U. S.*, 97 U. S. 237, 266.

Much less objectionable instructions on the same subject have been condemned.

Pettine v. Territory of New Mexico (C.C.A. 8) 201 Fed. 489.

Owens v. U. S. (C.C.A. 9) 130 Fed. 279.

U. S. v. Woods (C.C.A. 2) 66 F. (2) 262.

The circuit court erred in failing to see that other portions of the instruction *do not deal with proof but merely define reasonable doubt*. It is the portion dealing with the *proof* we think obviously error. The distinction may be narrow, but it is vital.

The instruction manifestly deprives petitioner of his fundamental right to an acquittal if the government fails to prove the affirmative of the issues involved beyond a reasonable doubt and shifted the burden to petitioner to show that there was a doubt based on reason before he could be acquitted.

This type of instruction has never been passed on by this court to our knowledge.

We believe that it is so prejudicial to all future defendants as to warrant this court in expressing its views on the very vital point involved. The very broad approval

given it by the circuit court (R. 564-565) makes certain that lower courts will feel free to use such an instruction in the future. The rights of many defendants will depend on this court's action.

POINT 3

THE CIRCUIT COURT ERRED IN HOLDING THAT THERE WAS NO PREJUDICE TO PETITIONER BY THE TRIAL COURT'S FAILURE TO DEFINE THE TERM "WILFUL" IN ITS INSTRUCTIONS TO THE JURY.

Wilfulness is the root of all the offenses charged (50 U.S.C.A. App. sec. 925(b) and sec. 633(5)).

The statutes are general in their terms and do not define the specific acts prohibited. Section 20.1 of Revised Ration Order 16 is general and refers to the entire Order which must be searched to attempt to find what is prohibited.

Under these circumstances the court must clearly define the term. Equivocation and uncertainty will not do. The giving of a clear definition of what the term "wilful" means is the only safeguard any defendant has against being punished for purported offenses which are not defined by the statutes but which must depend upon the terms of regulations not in being when the statutes were enacted. The trial court *must* clearly define the term.

Screws v. U. S., 395 U. S. 91.

Bollenbach v. U. S., 326 U. S. 607.

Spurr v. U. S., 174 U. S. 728.

The circuit court erred in justifying the omission by referring to an instruction (R. 479) which did not define wilful *but only told how intent could be determined.* The distinction is clear—telling *how* intent is determinable is *not a definition of wilfulness.*

The government offered a definition (R. 24) but none was given.

The prejudice is obvious since the point of wilfulness was at all times contested by petitioner and is the crux of the entire case. We believe that such an essential term *must* be made crystal clear to jurors as well as the fact that whether the required intent was entertained is the pivotal issue—the difference between guilt and innocence.

POINT 4

THE CIRCUIT COURT ERRED IN HOLDING THAT THE TRIAL COURT ADEQUATELY DEFINED THE LEGAL ELEMENTS INVOLVED AND THE FACTUAL ELEMENTS THE JURY MUST FIND TO EXIST BEFORE THE JURY COULD APPLY THE FACTS TO THE LAW AND FIND PETITIONER GUILTY.

The court failed to mention the statutes involved and said that the *regulations* made transfers *unlawful,* without mentioning the essential ingredient of wilfulness (Cf. R. 486, 487, 488). This gave the impression that the mere doing of the acts was a crime, irrespective of wilfulness.

Likewise the court failed to instruct as to the effect of section 11.7 of Revised Ration Order 16 (9 F.R. 6756).

This regulation is printed in the appendix and has the effect of allowing rationed foods to be stored and returned from storage point free.

The evidence clearly shows that appellant was merely the managing director of Huse's Restaurant and an employee (R. 188, 190, Pl. Ex. 41). All meat was purchased and stored for use in the restaurant (R. 135, 154, 324-326) and withdrawn by Rose, one of the partners, and by Michael, a co-employee of petitioner, for use in the restaurant (R. 135, 154, 324-326). The government did not attempt to show or urge that petitioner *sold* any of the meat to the restaurant.

Yet Counts 6, 7, 8, 9, 14, 15 and 16 are drawn on the theory that the meat was owned by petitioner, stored for his own use and that withdrawals from storage by Rose and Michael for the use of the restaurant was a violation of the regulations in that points were not surrendered to petitioner by Rose and Michael and the statement required to be given by a seller was not given by petitioner to Rose.

Plainly the jury should have had an instruction on this regulation which dispenses with the need for points under these circumstances.

The bearing on Spokane Overt Acts 1, 2, 3 and 4 of the indictment is also clear since they are drawn on the same theory—unlawfulness of the withdrawals by Rose of the

meat from storage without the surrender of points to petitioner.

Neither did the court instruct as to the legal effect of section 11.8 of Revised Ration Order 16, (9 F.R. 6756) printed in the appendix. The regulation provides that no points need be given up for a transfer for security purposes only. The prosecution hit hard and often at petitioner's instructions to change the storage account from Huse's Restaurant to his own name for security reasons, inferring that it was wrong (R. 170, 416-418, 541-542) although the storage charges were at all times billed to and paid by Huse's Restaurant (R. 180, 184). The question of whether petitioner sought, by the transfer, to defraud creditors was wholly irrelevant to the issue and should have been checked by the trial judge. *Pierce v. U. S.* (C.C.A. 6) 86 F. (2) 949.

In view of these inferences the jury should have had the benefit of the provisions of this regulation.

Taken as a whole we believe the instructions are subject to the infirmities condemned in *Morris v. U. S.* (C.C.A. 9) 156 F. (2) 525 and *Corson v. U. S.* (C.C.A. 9) 147 F. (2) 437.

Where the jury does not have all the legal bases involved, it cannot discharge its historic function of applying the facts to the law to determine guilt or innocence and

the convictions are void because the essential legal standards were not considered.

POINT 5

THE CIRCUIT COURT ERRED IN SUSTAINING THE CONVICTIONS ON COUNTS 14, 15 and 16 OF THE INFORMATION.

These counts involve Rev. M.P.R. No. 169, section 1364.407(f) (9 F.R. 9617).

That regulation, which appears in the appendix, provides that the prescribed statement must be given by the *seller* to the *purchaser*.

Since there was no evidence that petitioner *sold* any meat to Rose, one of the partners for whom petitioner was working, or to the partnership of Rose and Huse, there was a complete failure of proof as to these counts.

In any event there is not a scintilla of proof that such statements, even if required, were not given by petitioner to Rose. The record is completely silent on these counts.

The circuit court erred in not reversing as to these counts.

POINT 6

THE CIRCUIT COURT ERRED IN FAILING TO INSTRUCT THAT THE PROSECUTION MUST PROVE THAT AT LEAST ONE OF THE OVERT ACTS CHARGED IN THE INDICTMENT AS BEING COMMITTED IN THE EASTERN DISTRICT OF WASHINGTON WAS COMMITTED AS ALLEGED.

The indictment is unusual in that it contains two separ-

ate categories of overt acts—one group charged as occurring in Eastern Washington and one group in Montana.

The failure of the court to point out that one of the Eastern Washington overt acts must be established as charged left the jury free to convict on overt acts occurring in Montana.

The court's instruction was that "some overt act" must be done (R. 483) and "that at least one or more overt acts as charged was committed by one or more of them" (R. 484). The instructions fail to cover the point of what overt acts must be established or the degree of proof necessary to establish such required overt act.

We believe the action is in conflict with *Nash v. U. S.*, 229 U. S. 373, 379, 380:

> "Thus while it may be admitted that not all of the means alleged need be proved, the charge invited the jury to consider all and permitted a verdict upon any one of them."

POINT 7

THE CIRCUIT COURT ERRED IN INSTRUCTING THAT THE KNOWLEDGE OF MICHAEL COULD BE IMPUTED TO PETITIONER

The instruction (R. 501) clearly allows Michael's knowledge of a violation of the law to be imputed to petitioner if the jury considered Michael an accomplice.

We take it as elementary that a basic element of the of-

fense cannot be imputed to petitioner where there is no evidentiary basis therefor.

Freeman v. U. S. (C.C.A. 3) 20 F. (2) 748.
Williams v. U. S. (C.C.A. 5) 55 F. (2) 226.
Wietz v. Potter (CC) 32 Fed. 888, 889.

The point is important because although Michael was informed by Jacobs that the Montana seller of the beef was holding out for points (R. 144) petitioner wasn't there when Jacobs told Michael that (R. 145). There is no evidence that Michael, or anyone else, ever communicated that information to petitioner.

The prejudicial character of the instruction is evident.

POINT 8

THE CIRCUIT COURT ERRED IN HOLDING THAT PETITIONER SUFFERED NO PREJUDICE BY THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY TO DISREGARD THE ARGUMENT OF THE UNITED STATES ATTORNEY THAT THE PLEA OF GUILTY BY JACOBS TO THE CONSPIRACY TENDED TO PROVE A CONSPIRACY BETWEEN JACOBS AND PETITIONER.

The argument (R. 523) is a bald statement that because Jacobs, who had good legal advice and counsel, had pleaded guilty to the conspiracy, that Jacobs testimony buttressed by such plea, overcame petitioner's testimony concerning the existence of the conspiracy.

It is elementary that no act or declaration of a co-conspirator can bind another co-conspirator after the con-

spiracy has ended. Arrest and arraignment certainly ends the conspiracy. Obviously a plea of guilty by Jacobs is not binding or admissible to prove petitioner's guilt as to the existence of the conspiracy.

Where the prosecutor hits below the belt it is the duty of the court to restrain him and to instruct the jury to disregard his remarks.

Berger v. U. S., 295 U. S. 78.
Viereck v. U. S., 318 U. S. 236, 248.
N. Y. Central Ry. Co. v. Johnson, 279 U. S. 310.
Volkmor v. U. S. (C.C.A. 6) 13 F. (2) 594.
Pierce v. U. S. (C.C.A. 6) 86 F. (2) 949.
Kettenbach v. U. S. (C.C.A. 9) 202 Fed. 377, 385.

The prejudicial character of the incident seems clear.

POINT 9

THE CIRCUIT COURT ERRED IN HOLDING THAT THE TRIAL COURT'S ADMISSION OF PLAINTIFF'S EXHIBIT 62 DID NOT PREJUDICE PETITIONER.

Exhibit 62 was prepared by the witness who testified concerning the whole matter. It was obviously prepared for trial purposes (R. 294-303). It was addressed to petitioner, although not made at petitioner's request and the witness did not see or know petitioner. It was an official certificate as to the grades of meat said to be involved, although clearly hearsay, and introduced to establish the character of the meat.

No impeachment was involved—no lack of memory of the witness was involved. The exhibit was offered and admitted as independent evidence of the things it purports to state. This is error of the most flagrant type.

Luse v. U. S. (C.C.A. 9) 49 F. (2) 241.

Garber v. New York City Ry. Co., 92 N.Y.S. 722.

The prejudice is obvious when the exhibit is examined in the light of its official character (R. 299).

POINT 10

THE CIRCUIT COURT ERRED IN HOLDING THAT PETITIONER SUFFERED NO PREJUDICE FROM THE ADMISSION OF THE IMPEACHING TESTIMONY OF LOUIS E. MICHAEL.

The question propounded to appellant (R. 436, 437) related to a time "a few days before the 1st of February, 1945."

The question purporting to impeach petitioner's testimony put to Michael fixed the time as "a few days before March 1st, 1945." an entirely different time by a month.

Since the time was materially different, the objection to the purported impeachment should have been sustained.

Gordon v. U. S. (C.C.A. DC) 289 Fed. 552.

Gordon v. Thomas (C.C.A. DC) 70 F. (2) 752.

The matter was important because this was the very last testimony offered in the entire case and the jury was

thus left with the strong impression that petitioner wilfully made a false statement under oath.

The prejudice is clear in the setting in which the incident occurred.

POINT 11

THE CIRCUIT COURT ERRED IN RULING THAT THERE WERE NO ERRORS IN THE CASE WHICH SUBSTANTIALLY PREJUDICED PETITIONER.

We believe that the errors here committed and assigned as error to the circuit court (R. 41) are so numerous and of such importance that, *at a minimum*, the case falls within the principle of *Egan v. U. S.* (C.C.A. DC) 287 Fed. 958, 971, that:

> "While there is perhaps no single instance involving error so prejudicial as to warrant a reversal, we are convinced that, considered as a whole, the rights of defendant were so prejudiced thereby as to deprive him of that fair and impartial trial which the constitution and the law of the land accords to every citizen accused of the commission of a crime."

CONCLUSION

It is respectfully submitted that this case is one calling for the exercise of this court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision.



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50 USCA App. Sec. 633 (5)

"(5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

50 USCA App. Sec. 925 (b)

(b) Any person who willfully violates any provision of section 4 of this Act (section 904 of this Appendix), and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202 (sections 902 or 922 of this Appendix), shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) (section 904 (c) of this Appendix) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

Federal Rules of Criminal Procedure, Rule 37 (b)

(b) Petition for Review on Writ of Certiorari.

(1) Petition. Petition to the Supreme Court for writ of certiorari shall be made as prescribed in its rules.

(2). Time of Making Petition. Petition for writ of certiorari may be made within 30 days after entry of the judgment or within such further time not exceeding 30 days as the Court or a justice thereof for cause shown may fix within the 30-day period following judgment. If the judgment was entered in a district court in Alaska, Hawaii, Puerto Rico, Canal Zone or Virgin Islands, the petition shall be deemed in time if mailed under a postmark dated within such 30-day period.

Federal Rules of Criminal Procedure, Rule 52 (b)

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Revised Ration Order No. 16 (9 F.R. 6756) sec. 11.7

Sec. 11.7 *Foods may be stored and returned from storage, point-free.* (a) No points need be given up for a delivery of foods covered by this order for storage purposes only.

(b) No points need be given up for a delivery of such

foods from the place of storage to the person who stored them, or to a person to whom he has sold or transferred them. (However, that sale or transfer must be made in a way permitted by this order.)

Revised Ration Order No. 16 (9 F.R. 6756) sec. 11.8

Sec. 11.8 *Security interests in foods may be created and released, point-free.* (a) No points need be given up for a transfer of foods covered by this order, or of any interest in them, for security purposes only. (For example, if such foods are pledged or mortgaged, the person with whom they are pledged or mortgaged need not give up points.)

(b) No points need be given up for a release of a security interest in such foods, or for a return of those foods to the person who originally transferred them for security purposes. (For example, a person who pledged those foods may get them back without giving up points. Similarly, a person who gave a chattel mortgage on them need not give up points when the mortgage is ended.)

Revised Ration Order No. 16 (9 F.R. 6765) sec. 20.1

Sec. 20.1 *Additional prohibitions.* (a) No "person" shall use points unless he has received them in a way permitted by this or any other order of the Office of Price Administration.

(b) No person shall "transfer," "acquire," use or

possess "foods covered by this order" except in a way permitted by this or any other order of the Office of Price Administration.

(c) No person shall give or transfer points, a "stamp", "token" or a "certificate" to any other person, except in a way permitted by this or any other order of the Office of Price Administration.

(d) No person may transfer foods covered by this order for a stamp, token, certificate or ration check if he knows or has reason to believe that is it not valid or that the person tendering it is not entitled to use it.

(e) No person shall have a stamp, token, certificate or ration check in his possession except the person (or agent of the person) to whom it was issued or by whom it was acquired in a way permitted by this or any other order of the Office of Price Administration.

(f) No person shall deface, mutilate, or destroy any stamp, token, certificate or ration check, except where permitted by this or any other order of the Office of Price Administration. A defaced or mutilated stamp, token, certificate or ration check is not valid for any purpose.

(g) No person shall counterfeit, forge, or alter a stamp, token, certificate, credit authorization, or ration check, and no person shall transfer, acquire, possess, or use a coun-

terfeited, forged or altered stamp, token, certificate, credit authorization or ration check.

(h) No person may transfer foods covered by this order in violation of any applicable order of an agency of the United States.

(i) No person shall offer, solicit, attempt or agree to do, or assist in doing any act in violation of this order.

(j) Paragraphs (b), (c), (e), (f), (g) and (h) of this section do not apply to public officials who do any of those acts in the performance of their public duties.

(k) No person shall, in any registration, report, application, or other statement or record made pursuant to or required by this order, make any untrue statement of fact, or omit to state any fact which is required to be stated or which is necessary to make a statement not misleading.

(l) No person shall, after demand, withhold a stamp, token, certificate or ration check from the person who is entitled to have it.

(m) No person shall sell or transfer any item of foods covered by this order at a price in excess of the applicable maximum price established for that item by the Office of Price Administration.

(n) No person shall sell or transfer any item of food covered by this order except in a form in which it appears

on the Official Tables of Consumer Point Values or Official Table of Trade Point Values.

Sec. 1364.407 (f) Rev. M.P.R. No. 169 (9 F.R. 9617)

(f) Whenever used in this paragraph (f), the term "shipment" shall mean all commodities which are consigned to a single buyer as part of a single freight car or truck movement for delivery to the place of business or warehouse of the buyer, other than a consignment for delivery of the entire content of a common carrier freight car or truck to a war procurement agency.

(1) Except as provided in paragraph (f) (2) of this sec. 1364.407, every person making a sale of any beef carcass, beef wholesale cut, veal carcass, veal wholesale cut, or other meat item subject to this revised regulation, shall furnish to the purchaser at the time of delivery a written statement setting forth the name and address of the buyer and seller; identifying each such item sold; setting forth the quantity, grade, including sex identification of beef as to stag or bull, the weight thereof, and the price charged and/or received therefor, including a separate statement of the transportation and local delivery charge as required by sec. 1364.454 (a) (7).

(2) (i) In the case of any shipment made to a buyer located within a radius of 25 miles from the seller's dis-

tribution point, and in the case of any C.O.D. shipment made, irrespective of the distance, each person shipping any of the meat items subject to this revised regulation, shall send with each such shipment, a copy of the written statement referred to in paragraph (f) (1) hereof.

(ii) In the case of a shipment made to a buyer located beyond a radius of 25 miles from the seller's distribution point, other than a C.O.D. shipment, each person shipping any of the meat items subject to this regulation, shall send with each such shipment, a copy of the written statement referred to in paragraph (f) (1) hereof: *Provided, however,* That if the shipment made to the buyer is commenced before 12 o'clock noon, that portion of the statement with respect to the price charged or received therefor, and the separate statement of the transportation and/or local delivery charge, may be omitted but must be mailed to the buyer on the same day. If the shipment made to the buyer is commenced after 12 o'clock noon that portion of the statement with respect to the price charged or received therefor, and the separate statement of the transportation and/or local delivery charge may be omitted but must be mailed to the buyer before 12 o'clock noon of the following business day.

(iii) Where the shipment made constitutes the entire content of a common carrier freight car or truck, the copy of the statement referred to in paragraph (f) (1) shall be

posted in the freight car or truck near or on the door. Where the shipment made constitutes only a part of the content of a common carrier freight car or truck, the copy shall be securely attached in a conspicuous place to one of the items included within the shipment. Where the shipment made is by a vehicle other than a common carrier, the copy referred to shall be given to and carried by the driver and he shall be authorized to display it to enforcement officers on request.

(iv) Every person transferring any of the meat items subject to this regulation to a business establishment or warehouse controlled or operated by him, which constitute the entire content of a vehicle, shall send with each vehicle making such transfer, a statement showing the name and address of the owner, the point of destination and that the meat items are not being transferred to a buyer in connection with a sale. The transfer must be identified in the same manner as required in the foregoing sub-paragraph (2) (iii) of this paragraph (f) except that the statement with respect to price or transportation and/or local delivery charge shall not be required.

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In the Supreme Court of the United States

OCTOBER TERM, ~~1947~~ 1946

NOS. 1068–1069

SAUL S. FREEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 556–565) is reported at 158 F. 2d 891.

JURISDICTION

The judgments of the circuit court of appeals were entered December 30, 1946 (R. 566, 567), and a petition for rehearing was denied January 30, 1947 (R. 568). The petition for writs of certiorari was filed February 27, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b)

(2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the indictment and information were void for failure to particularize the specific parts of the applicable O. P. A. regulations involved.

2. Whether the conspiracy indictment is void on the ground that the underlying substantive offenses allegedly required a combination of the co-conspirators.

3. Whether the indictment is void because it failed to state that the conspiracy was formed in the district of indictment, where overt acts were charged as having occurred within that district.

4. Whether the trial court erred in its instructions to the jury with respect to: (a) proof beyond a reasonable doubt; and (b) imputation of certain knowledge to petitioner.

5. Whether, under the circumstances, it was prejudicial error for the trial court not to have specifically instructed the jury with respect to: (a) wilfulness; (b) the requisite proof that one of the overt acts set forth in the conspiracy indictment occurred in the district of indictment; (c) the inapplicability of the ration and price regulations to the particular transactions involved; and (d) their duty to disregard alleged prejudicial argument of the prosecutor referring

to the fact that petitioner's alleged co-conspirator had pleaded guilty.

6. Whether a certain exhibit was admissible in evidence.

7. Whether certain impeaching testimony was admissible in evidence.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Second War Powers Act of 1942, the Emergency Price Control Act of 1942, and regulations promulgated thereunder are set out in the Appendix, *infra*, pp. 24–27.

STATEMENT

On June 25, 1945, an information in 16 counts was filed in the District Court for the Eastern District of Washington, charging that petitioner and Ralph W. Jacobs and Irving B. Rose, violated the Second War Powers Act of 1942, the Emergency Price Control Act of 1942, and certain orders and regulations promulgated thereunder (R. 2–16). Only counts 1, 6, 7, 8, 9, 11, 12, 14, 15 and 16 named petitioner as a defendant. Count 1 charged that petitioner and Jacobs violated Revised Ration Order 16 (see Section 10.3, *infra*, p. 25), by acquiring 40 quarters of beef from a seller in Montana without surrendering the required ration points (R. 2–3). Counts 11 and 12 charged that petitioner and Rose acquired four barrels of fresh beef on two separate occasions

from a seller in Minneapolis, Minnesota, without proper ration evidences (R. 10–12). Counts 14 through 16 charged that petitioner violated Revised Maximum Price Regulation 169 (see Section 1364.407 (f) *infra,* p. 27), in that he failed to furnish a statement in the nature of a receipt covering the several transfers of portions of the 40 quarters of beef involved in counts 6 through 9 (R. 13–15). On August 11, 1945, an indictment was returned in the same district charging all of the same defendants with conspiracy to commit the substantive violations upon which counts 1, 6 through 9, and 14 through 16 of the information of June 25, 1945 were predicated (R. 17–22). After a consolidated jury trial on the information and the indictment, petitioner was found guilty on all counts of the information applicable to him and on the indictment (R. 24–25, 34).[1] He was sentenced to imprisonment for ten months each on counts 1 and 11 of the information and on the indictment, these sentences to run concurrently, and to pay a fine of $1,000 each on counts 11 and 12 of the information. On counts 6 through 9 and 14 through 16 of the information imposition of sentence was suspended and petitioner placed on probation for a period of six months, to commence at the expiration of the

[1] Jacobs pleaded guilty (R. 371). Rose who was tried with petitioner was found guilty on counts 2, 3, 4, 5, 11 and 12 (R. 24–25). The record does not indicate what sentences were imposed upon Jacobs and Rose.

service of the sentences of imprisonment. (R. 27–29, 36–37.) On appeal to the Circuit Court of Appeals for the Ninth Circuit, petitioner's convictions were affirmed (R. 566, 567).[2]

The evidence in support of the Government's case may be summarized as follows:

Petitioner, a public accountant in Spokane, Washington, conceived the idea, in the summer of 1944, of establishing a restaurant in Spokane (R. 186–189). He, Rose, and one Huse, entered into negotiations with the result that Rose and Huse formed a partnership for the operation of Huse's Restaurant (R. 190–199), and employed petitioner as its paid managing director and accountant (R. 200–204). The agreement contemplated that petitioner would loan $10,000 to Huse for the venture, and that when this money was returned, petitioner would have a 1/6 interest in the business (R. 200–202). The money was not repaid (R. 208), and Huse dropped out before the business was fully developed (R. 220). Petitioner was very active in the business; he negotiated the lease for the premises occupied by the restaurant (R. 61–65), signed all checks (R. 194), and by agreement of all the interested parties exercised complete authority to determine the business policy of the venture (see, e. g., R. 151–152, 193, 383–384). At petitioner's instigation

[2] Separate appeals were taken by petitioner from his conviction on the information and that on the indictment (R. 31, 38).

(R. 122, 395), one Louis Michael, a restaurant man and a former O. P. A. employee (R. 395) was hired to run the restaurant and take care of rationing problems (R. 142–143, 422, 396). The restaurant opened in December 1944 and lost money from the start (R. 397). Shortly after the opening, petitioner asked Ralph W. Jacobs, his codefendant, to assist in the operation of the business on the inducement that Jacobs might later acquire an interest in the business (R. 357–358).

The violations charged in the information and indictment were predicated on the following two series of transactions:

(1) In a discussion concerning the acquisition of meat for Huse's Restaurant, Jacobs told petitioner that he (Jacobs) could borrow some points from another account, but that such points would have to be paid back (R. 359). Petitioner gave Jacobs $500 of his personal funds to use in buying meat (R. 361, 436). Jacobs then made two separate purchases of meat in Minneapolis giving the seller only part of the required points and those points were "borrowed" from another account (R. 360, 142). The balance of the points owed on the Minneapolis purchase were never paid (R. 238–242). The meat was shipped from Minneapolis to the restaurant in Spokane in February 1945 (R. 132). Petitioner notified Michael of the expected arrival of the meat (R. 134–135).

(2) Upon being informed by Jacobs that some meat could be purchased in Missoula, Montana, without ration points, petitioner told Jacobs to "Buy the meat; it was a good buy" (R. 363). Jacobs went to Montana and purchased forty quarters of meat with $2,500 in cash that petitioner had given him (R. 363–364) from his personal funds (R. 436). The meat was then shipped from Missoula in March 1945, on a bill of lading describing the shipment as "poultry" and, in accordance with petitioner's instructions, consigned to him (R. 364, 279). After the meat arrived in Spokane it was put in cold storage in petitioner's name (R. 367, 419). No ration points were ever given the Montana seller for this meat (R. 150, 413), nor did petitioner mention anything about giving ration points for it (R. 149), for, as Michael testified, "There couldn't have been. We didn't have enough points to pay for anything like that" (R. 150). The meat was later withdrawn from storage in small quantities and used in the restaurant, and no ration points were surrendered at those times (R. 381–386). On May 25, 1945, when petitioner sold the restaurant to the Pacific Coast Railroad Men's Association, thirteen quarters of the beef remained in cold storage (R. 443–444). Rose testified that petitioner instructed him to withdraw four of these quarters and turn them over to the Association.

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No points were received for this transfer. (R. 384–386).

Petitioner claimed that he knew nothing about O. P. A. ration regulations (R. 410). However, he had previously sought and signed requests for additional ration allotments on behalf of another restaurant, with which he was connected, when it had overdrawn its ration account (R. 458–461). Moreover, the initial application for ration points for Huse's Restaurant was prepared in petitioner's office (R. 220, 221).

ARGUMENT

At the outset, we should like to note that, as petitioner concedes, "Trial counsel interposed no demurrer to the indictment or information nor made any request for a bill of particulars. No challenge to the sufficiency of the government's evidence was interposed at the conclusion of the government's case in chief. No motion for directed verdict was made at the conclusion of the entire case. No requested instruction on *wilful* (sic) was offered by trial counsel although one was offered by the government (R. 24) and not given. Trial counsel did not except to the giving of the instructions involved or to the failure to give any of the instructions here in issue. Many of [petitioner's] assignment of errors to the introduction of evidence and the argument of government counsel are not supported by exceptions." (Pet. 33–34). Petitioner relies on the "plain er-

ror" doctrine (Pet. 34), and upon the theory that even if no single alleged error is conceived to have been prejudicial, the accumulation of many did constitute prejudice (Pet. 47), to support his overall assertion that he was denied a fair trial. He apparently assumes that review on certiorari is determined by the quantity rather than the quality of the asserted errors. We submit, however, that the various alleged errors were waived by the failure to make timely objection or exception and that, even if petitioner's failure in the trial court to raise any of the issues now advanced is not deemed to belie the claim of "plain error," our seriatim treatment of the questions presented will conclusively serve that purpose.

1. Petitioner contends that the indictment and information were deficient in failing to particularize the specific parts of the applicable ration order violated (Pet. 35–36, 39). The court below furnished a decisive answer to this contention in stating that the information referred to the sections of the Revised Ration Order allegedly violated, and set out with sufficient certainty all of the necessary elements of the offense and that, had petitioner felt unable to defend, because of the lack of more definite information, he should have moved for a bill of particulars (see opinion below at R. 561).

2. Petitioner's contention, that the conspiracy indictment was void because the offenses allegedly

conspired to have been committed involved the mutual cooperation of the persons charged, and that therefore the preliminary agreement between the parties to commit the offenses was not an indictable conspiracy (Pet. 35), was also fully answered by the court below (see opinion at R. 563). The conspiracy as charged in the indictment involved more than those parties—buyer and seller—necessary to the illegal transaction; it included on the purchasing side of the transaction the buyer (petitioner) and other persons, associated with him in the restaurant enterprise, who were not necessary parties to the substantive violation arising from petitioner's purchase of the Montana meat.

3. Petitioner urges that the indictment is also void because it failed to state where the conspiracy was formed or even that it was formed in the United States (Pet. 34). However, as the court below pointed out (R. 562–563), the indictment charged that petitioner received and put the 40 quarters of beef into cold storage at Spokane, Washington (R. 20), thus satisfying the requirements for venue in that district. Cf. *United States* v. *Socony Vacuum Oil Co., Inc.,* 310 U. S. 150; *Davis* v. *United States,* 148 F. 2d 203 (C. C. A. 5); *Hickok* v. *Hunter,* 150 F. 2d 635 (C. C. A. 10).

4. (a) Petitioner contends, with respect to the instructions given the jury, that the trial court's definition of proof beyond a reasonable doubt was

erroneous (Pet. 36–38). The burden of this contention is the assertion that "The instruction manifestly deprives petitioner of his fundamental right to an acquittal if the government fails to prove the affirmative of the issues involved beyond a reasonable doubt and shifted the burden to petitioner to show that there was a doubt based on reason before he could be acquitted" (Pet. 37).

The disputed instruction, set out in the margin,[2] clearly follows accepted patterns and,

[2] "The law presumes every defendant to be innocent until such one is proven guilty by the evidence beyond all reasonable doubt. This presumption is not a mere matter of form. It is a substantial right of every defendant in every case. Such presumption continues throughout the entire trial and until the jury finds that such presumption has been overcome by the evidence beyond all reasonable doubt.

* * * * *

" 'Proof beyond all reasonable doubt' means just what the words imply, that any doubt which will justify acquittal must be a reasonable doubt, must be a doubt based upon reason. 'Proof beyond all reasonable doubt' does not mean that the evidence shall establish the guilt of the defendant beyond all possible doubt. The law does not require absolute certainty of guilt before there can be a verdict of guilty at the hands of the jury. A reasonable doubt must arise from the evidence or lack of evidence. A reasonable doubt must not arise from sympathy and no one has a right to use reasonable doubt as an excuse for avoiding an unpleasant duty. A reasonable doubt is not a mere whim or vague misgiving founded upon mere possibility. Only such doubt as an honest fair-minded man or woman would reasonably entertain is [sic] an honest and impartial investigation to ascertain the truth about the serious matters of life would be a reasonable doubt. In order to warrant conviction as to any count the evidence before you must not be such as to exclude all doubt or possibility of doubt, but it must be

in our opinion, is not in any way open to the challenge now advanced by petitioner. If nothing else, that portion to the effect that a reasonable doubt must arise from the evidence or "lack of evidence" (R. 478) manifestly demonstrates that the jury was advised that the Government carried the burden of proof throughout the trial (cf. also first paragraph in fn. 3, *supra*, p. 11). Had petitioner believed there was something in the instruction which might leave the jury to assume otherwise, he should have requested a clarifying instruction.

(b) Petitioner also complains of an instruction which he asserts permitted the jury to impute the knowledge of Michael to him (knowledge Michael obtained from Jacobs pertaining to the purchase of the Montana beef without ration points) (Pet. 43–44). However, this instruction,

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strong enough to exclude from your mind all reasonable doubt. If, after considering all the evidence in this case, you can say that such leaves in your mind a firm, honest and abiding conviction as to the guilt of the defendants or either of them, as to any count or counts, or as to any charge or charges, then you are convinced beyond a reasonable doubt and then it is your duty to find such defendants or defendant guilty as to such count or counts or such charges or charge. On the other hand, if you do not have a firm, honest and abiding and conscious conviction as to the guilt of the defendants or one of the defendants as to any count or counts or as to any charge or charges, then you have a reasonable doubt and then it is your duty to find such defendant or defendants not guilty as to any such count or counts, charge or charges. Frequently, 'proof beyond all reasonable doubt' is defined as proof to a moral certainty." (R. 476, 478–479.)

set forth in the margin,[4] merely advised the jury that if they found Michael to be an accomplice because he knew the law was being violated, they could then consider whether it was reasonably likely Michael could have known this without petitioner and others connected with the restaurant having at least as much knowledge. The instruction did not require an imputation of Michael's knowledge to petitioner, and it only permitted the jury to make such an inference on the condition that they first find that in fact Michael was petitioner's accomplice. With that prerequisite, such an inference was clearly permissible, particularly in view of the compelling evidence showing the close working relationship of petitioner and Michael (see, e. g., Statement *supra*, pp. 5, 6, 7), and in the light of the trial court's cautionary instruction that the testimony of an accomplice must be scrutinized carefully (R. 500–501).

5. (a) Petitioner contends that the charge to the jury was fatally deficient in that the trial court failed to explain and define what constitutes a "wilful" violation, wilfulness being a statutory prerequisite of all the offenses charged (Pet. 38–39). While the court did not specifically define

[4] "In the event you are convinced or believe that Mr. Michael was an accomplice in that he knew that the law was being violated, you have the right, of course, then, to consider whether it is reasonably likely that he would have known such without the other persons connected with the restaurant having at least as much knowledge" (R. 501).

the word "wilful," it did in other parts of its charge [5] require the jury to find elements which in substance constitute wilfulness in order to convict petitioner. Consequently, the absence of a specific definition of wilfulness did not prejudice petitioner for the jury was required to find, for example, that the violations were "knowingly and intentionally committed for the purpose of carrying forward a scheme to violate the law." Cf. *United States* v. *Fish,* 154 F. 2d 798, 801 (C. C. A.

[5] The pertinent parts of the charge which in effect covered the elements of "wilfulness" are as follows:

"You are advised that the law presumes that every man intends the natural and probable consequences of his own acts and intent may be presumed if unlawful acts have been committed, and it is shown that such acts were a part of a plan and were knowingly and intentionally committed for the purpose of carrying forward a scheme to violate the law as charged. The evidence of intent may be shown by the acts of the parties concerned and by the attendant circumstances as well as by direct evidence. It is psychologically impossible to enter into the minds of the defendants and determine the intention with which they acted or the purpose they had or the knowledge they possessed and, therefore, it is required that you determine under the evidence the knowledge they had and their intention and the purpose from the evidence and all the facts and circumstances shown by the evidence" (R. 479.)

"First, that there was a plan or scheme knowingly undertaken and agreed upon to commit an offense or offenses against the United States; and, second, that some overt act, that is, some affirmative act, was done by at least one of the parties for the purpose of affecting [sic] the object of the scheme or conspiracy. It is not necessary that it be established beyond a reasonable doubt or at all that the conspiracy succeeded if persons knowingly and intentionally associated themselves together with the understanding

2), certiorari denied, 328 U. S. 869, and *Zimberg* v. *United States,* 142 F. 2d 132, 137–138 (C. C. A. 1), certiorari denied, 323 U. S. 712, holding that wilfulness under the Emergency Price Control Act means knowingly and intentionally.

(b) Petitioner further objects to the omission from the charge of an instruction that at least one of the overt acts charged in the conspiracy indictment must have been proved to have been

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that they would violate some of the laws of the United States as charged in the indictment; and if one or more of them did one or more acts for the purpose of accomplishing the object, then all are guilty regardless of whether the scheme succeeded or not. To prove that the conspiracy as charged existed and was in operation, it is not necessary to prove that the defendants or any of them entered into a written or oral agreement or made any declaration acknowledging membership therein, but it is necessary to prove that they knowingly and intentionally conspired together for the unlawful purpose charged in the indictment and that at least one or more overt acts as charged was committed by one or more of them. When an unlawful object is knowingly sought to be effected and two or more persons actuated by a common purpose intentionally work together in any manner in furtherance thereof, every person knowingly participating is a party to the conspiracy no matter what part he may take in the execution of the plan or how small or trivial his part may be. Any act done by one of the parties to such a conspiracy knowingly in furtherance of the common plan is in contemplation of the law the act of all the parties and that is whether they know about it or not, and likewise any one of the conspirators is bound by the statements and declarations made by a co-conspirator made during the life of the conspiracy for the purpose of helping achieve the object of the conspiracy." (R. 483–484.)

committed in the Eastern District of Washington (Pet. 42–43). This contention is patently specious. The indictment listed at least 6 overt acts which are charged to have been committed in the Eastern District of Washington (R. 19). And, according to petitioner's own testimony, he advanced Jacobs $500.00 and $2,500 in the Eastern District of Washington to make the Minneapolis and Missoula purchases (R. 436). Furthermore, he admitted purchasing the Montana meat by telephone conversation with Jacobs, petitioner then being in Spokane, Washington and Jacobs in Missoula, Montana (R. 405). Additionally, the proof showed that the restaurant's activities were conducted from its place of business in Spokane, Washington. In short, the evidence unequivocally showed that many of the overt acts and the conspiracy as a whole stemmed primarily from the Eastern District of Washington, so that at the trial there was not the slightest doubt that venue was properly laid. In this posture the trial court's omission of a specific instruction in this connection was not error.

(c) Petitioner also argues—with respect to counts 6–9 and 14–16 (Montana meat)—that since there was no evidence of "sales" by petitioner to Rose, the provisions of the ration order requiring the receipt of points and the provision of the price regulation requiring a statement (receipt) were inapplicable, and that consequently these counts should not have been submitted to the

jury (Pet. 39–42). This argument is predicated on petitioner's assertion that the Montana meat was originally purchased for the restaurant and not by him for his own account, so that when the meat was withdrawn from cold storage and sent to the restaurant no "sale" was involved which required the giving of ration points or a statement in the nature of a receipt. Preliminarily, it should be noted that only the probationary sentence, and not the sentence ordering imprisonment and fines, depends upon the validity of the conviction on the foregoing counts (see Statement *supra*, pp. 4–5). In any event, petitioner's contention is without merit. As petitioner points out, Revised Ration Order No. 16 provides in part that no points need be surrendered for foods delivered from storage to the persons who stores them (Section 11.7 *infra*, p. 26), or for a return of those foods to the person who originally transferred them for security purposes (Section 11.8 *infra*, p. 26). There was, however, ample evidence that petitioner stored the meat for his own account, and that its transfer from the warehouse to the restaurant was a sale and not a withdrawal by the restaurant itself coming within the exception provided above.[6] Thus the evidence

[6] And on appeal the evidence must be taken in the light most favorable to the Government. See *Glasser* v. *United States*, 315 U. S. 60, 80; *Mortenson* v. *United States*, 322 U. S. 369; *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150.

showed that petitioner advanced the money for the purchase of the Montana meat out of personal funds, that as directed by petitioner the meat was stored in Spokane under his and not the restaurant's name (see Statement *supra*, p. 7), and that his interests were not completely identifiable with those of the restaurant (cf. Pet. 40–41). Under these circumstances, had petitioner desired the jury to consider the defensive theory now advanced, that the withdrawal of the meat from the warehouse was merely an intra-business transfer within the exception provided either by Section 11.7 or 11.8 of the ration regulation, and that, therefore, ration points were not required as charged in counts 6–9, he should have made a timely request for appropriate instructions. By not so doing, he left the case in the posture well justified by the evidence, that he sold the meat to the restaurant in violation of the ration regulation.

For similar reasons, petitioner's objections relating to the submission to the jury of counts 14 through 16, charging a failure to furnish the statement required by Section 1364.407 (f) of Revised Maximum Price Regulation 169 (*infra*, p. 27) are without foundation. Furthermore, Section 302 (a) of the Emergency Price Control Act, 56 Stat. 23, 36 (50 U. S. C. App., Supp. V, 942 (a)), defines "sale" to include any "dispositions, exchanges, leases and other transfers." Thus, even if the transfer of the Montana meat from storage to the restaurant is not to be consid-

ered a sale in the ordinary sense of the word, that transfer could not be made without furnishing the statement required by the Maximum Price Regulation.

(d) Petitioner's final complaint to the court's charge is that he was prejudiced by the omission of an instruction that the jury should disregard the argument of the United States Attorney to the effect that Jacobs' plea of guily to the conspiracy tended to prove the conspiracy between him and petitioner (Pet. 44–45). Since petitioner has not included in the record before this Court all of the argument of counsel, but merely the opening and closing statements of the United States Attorney, it cannot now be determined whether in context the particular statements complained of were unjustified or prejudicial. Cf. *Pietch* v. *United States,* 110 F. 2d 817, 822–823 (C. C. A. 10), certiorari denied, 310 U. S. 648; *United States* v. *Dilliard,* 101 F. 2d 829, 837 (C. C. A. 2), certiorari denied, 306 U. S. 635; *Landay* v. *United States,* 108 F. 2d 698, 706 (C. C. A. 6), certiorari denied, 309 U. S. 681. Moreover, it is patent that the disputed argument of the United States Attorney, set out in the margin,[7] was not directed to the conclusion that

[7] "I think, Ladies and Gentlemen of the Jury, if you consider the evidence that has been put in, there can be no doubt of any character concerning the unlawful agreement here between Freeman and Jacobs initially and then Rose coming into it, and the Court will instruct you on that phase of the law of conspiracy, the unlawful agreement

Jacobs' plea proved the conspiracy between him and petitioner, but that it was merely intended to show why Jacobs' veracity could be assumed. It was, of course, impossible to conceal from the jury the fact that Jacobs had pleaded guilty, since his name appeared on the indictment and information along with petitioner's, and since he testified without objection that he had pleaded guilty (R. 371). And certainly, it was permissible for the jury to infer that since Jacobs had pleaded guilty to the conspiracy, and had no further interest in the proceedings, his version of the events, rather than petitioner's, was to be believed.

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between Freeman and Jacobs, and then Rose being a party to it in withdrawing the meat and putting it inside of the restaurant.

"Who, in addition to Louis Michael and all that documentary evidence, says that there was an understanding with Freeman? Jacobs.

"Jacobs says, 'I did these things, and I did them with Freeman, and I have had the conversations with him, and I have plead guilty of being a party to a conspiracy with these two men in this thing.' If a conspiracy isn't a fact in the face of all that testimony, then Jacobs is a subject for a sanity commission.

"Jacobs had good legal advice and counsel. His counsel here in court is Frank McKevitt. Can you in the face of that admission of this man in court, who bares his breast and says, 'I am a man who was a party in that conspiracy, in those transactions and I am ready to take my medicine;' and on the other hand the evasive testimony of Freeman, whom I had to question continually before he would answer a question directly, can you say that that type of testimony is not overcome by the testimony that is buttressed by the plea of guilty by Jacobs himself." (R. 522–533).

6. It is urged that the trial court erred in admitting Exhibit 62 which is asserted to be highly prejudicial hearsay evidence (Pet. 45–46). Exhibit 62 is a certificate of the United States Department of Agriculture dated June 5, 1945, listing the remaining quarters of the Montana beef and the grade and weight fixed for each (R. 299–300). The exhibit was signed by one Davis, an employee of the Department of Agriculture, who identified it in evidence (R. 298) and testified to all the facts contained therein and the method of its preparation (R. 297). This testimony was not controverted, nor was Davis even cross-examined about the accuracy of his grading or as to the quantity of the meat (see R. 301–303). Furthermore, the certificate did not in any way add to his oral testimony. Its admission therefore, even if erroneous, could not have prejudiced petitioner. However, it is clear that the certificate was admissible, for it was an official document of the Department of Agriculture qualifying as *prima facie* evidence of the facts asserted therein by reason of its character as a public record. Rule 27, Federal Rules of Criminal Procedure; Rule 44 (a), Federal Rules of Civil Procedure; Act of June 20. 1936, c. 640 § 1, 49 Stat. 1561, 28 U. S. C. 695. See also pp. 8–10, memorandum for the United States in Opposition in *Leonard* v. *United States,* No. 834, O. T. 1946, certiorari denied, March 3, 1947.

7. Petitioner's final complaint is that it was prejudicial error for the trial court to admit certain impeaching testimony of the witness Michael (Pet. 46–47). Petitioner was cross-examined in detail by the prosecutor with respect to a conversation with Jacobs in Huse's Restaurant concerning the purchase of the Montana meat. In questioning petitioner, the prosecutor placed the conversation as having occurred a few days before the first of February, 1945. (See R. 436–437.) Petitioner did not recall having had this conversation (R. 437). Thereafter, Michael was questioned about all the pertinent details of this conversation, but in propounding the questions to Michael the prosecutor placed the conversation as having occurred a few days before March 1, 1945 (R. 470). Petitioner's counsel did not object to this questioning on the ground that a proper foundation had not been laid; he merely objected on the ground that it was not within the issues of the case and that it attempted impeachment on an entirely collateral matter (R. 471). Examination of the complete text of the pertinent testimony clearly shows (1) that both witnesses were questioned with regard to the same alleged conversation; (2) that the witnesses, the jury, and all other participants so understood it; and (3) that the prosecutor merely made a negligible slip in placing the conversation before the first of March 1945 in the one instance and before the 1st of February 1945 in the other.

CONCLUSION

We resectfully submit that the judgment below is clearly correct, and that, therefore, the petition for writs of certiorari should be denied.

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APRIL 1947.

APPENDIX

The Second War Powers Act of 1942, as amended (56 Stat. 176, 50 U. S. C. App. Supp. V, 631 et seq.), provides in pertinent part:

> Section 301 (5). [50 U. S. C. App., Supp. V, 633 (5)] Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

The Emergency Price Control Act of 1942, as amended (56 Stat. 23, 58 Stat. 632, 50 U. S. C. App., Supp. V, 901, *et seq.*) provides in pertinent part:

> SEC. 4 (a) [50 U. S. C. App., Supp. V, 904 (a)] It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.
>
> * * * * *

SEC. 205 (b) [50 U. S .C. App., Supp. V, 925 (b)] Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

Revised Ration Order 16 (9 F. R. 6731), promulgated pursuant to the Second War Powers Act, provides in pertinent part:

SEC. 10.3. *Transfers to retailers, wholesalers and primary distributors after April 10, 1943 may be made only for points.* (a) Beginning April 11, 1943, no person may sell or transfer foods covered by this order to a retailer, wholesaler, or primary distributor, and no retailer, wholesaler or primary distributor may buy or acquire those foods, unless points are given up in the way this order requires. (The word "transfer", as it is defined, means to sell, as well as to transfer in other ways. The word "acquire" means to buy, as well as to get in other ways. Therefore, the only words which will generally be used, in later sections, are "transfer" and "acquire".)

* * * * *

SEC. 11.7 *Foods may be stored and returned from storage, point-free.* (a) No points need be given up for a delivery of foods covered by this order for storage purposes only.

(b) No points need be given up for a delivery of such foods from the place of storage to the person who stored them, or to a person to whom he has sold or transferred them. (However, that sale or transfer must be made in a way permitted by this order.)

SEC. 11.8 *Security interest in foods may be created and released, point-free.* (a) No points need be given up for a transfer of foods covered by this order, or of any interest in them, for security purposes only. (For example, if such foods are pledged or mortgaged, the person with whom they are pledged or mortgaged need not give up points.)

(b) No points need be given up for a release of a security interest in such foods, or for a return of those foods to the person who originally transferred them for security purposes. (For example, a person who pledged those foods may get them back without giving up points. Similarly, a person who gave a chattel mortgage on them need not give up points when the mortgage is ended.)

* * * * *

SEC. 20.1 *Additional prohibitions.* * * * (b) No person shall "transfer", "acquire", use or possess "foods covered by this order" except in a way permitted by this or any other order of the Office of Price Administration.

Revised Maximum Price Regulation 169 (8 F. R. 4097), as amended, promulgated pursuant to

the Emergency Price Control Act, provides in pertinent part (9 F. R. 9617):

SEC. 1364.407 (f) Whenever used in this paragraph (f), the term "shipment" shall mean all commodities which are consigned to a single buyer as part of a single freight car or truck movement for delivery to the place of business or warehouse of the buyer, other than a consignment for delivery of the entire content of a common carrier freight car or truck to a war procurement agency.

(1) Except as provided in paragraph (f) (2) of this § 1364.407, every person making a sale of any beef carcass, beef wholesale cut, veal carcass, veal wholesale cut, processed product or other meat item subject to this revised regulation, shall furnish to the purchaser at the time of delivery a written statement setting forth the name and address of the buyer and seller; identifying each such item sold; setting forth the quantity, grade, including sex identification of beef as to stag or bull, the weight thereof, and the price charged and/or received therefor, including a separate statement of the transportation and local delivery charge as required by § 1364.454 (a) (7).

(2) (i) In the case of any shipment made to a buyer located within a radius of 25 miles from the seller's distribution point, and in the case of any C. O. D. shipment made, irrespective of the distance, each person shipping any of the meat items subject to this revised regulation, shall send with each such shipment, a copy of the written statement referred to in paragraph (f) (1) hereof.

U. S. GOVERNMENT PRINTING OFFICE: 1947